Re Shaw, ex p Banque Indosuez

HIGH COURT (SINGAPORE) — BANKRUPTCY NO 2874 OF 1986
CHAN SEK KEONG J
15 DECEMBER 1989

Civil Procedure — Stay of execution — Order of costs — Whether a stay of execution of an order of costs should be made on the ground of matters which have occurred since the date the order was made — Rules of the Supreme Court 1970, O 45 r 11

The judgment creditor ('the creditor') had obtained judgment ('the judgment') against the debtor in the sum of $858,289.85 on 17 February 1986 and subsequently commenced bankruptcy proceedings against the debtor. Pursuant thereto, the debtor was made a bankrupt. However, the adjudication and receiving orders against the debtor were set aside by consent on 27 October 1988 with costs ordered against the creditor ('the costs order').

Subsequent to the costs order, the debtor commenced an action against the creditor for damages for malicious prosecution in relation to the bankruptcy proceedings against himself, and obtained an order against the creditor to stay execution and further proceedings on the judgment ('the stay order').

The creditor then applied under O 45 r 11 of the Rules of the Supreme Court 1970 for a stay of execution in respect of the costs order made against the creditor on the ground that in view of the stay order on the judgment it would not be equitable if the debtor were to enforce the costs order against the creditor if the creditor was not allowed to enforce the judgment against the debtor. The creditor's application was dismissed by the senior assistant registrar, and the issue on appeal was whether the creditor's application came within the terms of O 45 r 11.

Held, allowing the creditor's appeal:

(1) The court's power to make under O 45 r 11 was restricted to any matter occurring since the date of the relevant judgment or order against which relief is asked which, if that matter had occurred on or before the date of the judgment or order would or might have led to the grant of such stay of execution now being sought.

(2) In the present case, the only issue was therefore whether it was possible for the stay order to have occurred before the costs order so as to prevent the costs order being made, or if made, to lead to a stay of execution of the costs order.

(3) The stay order was granted because the debtor in that action had made a bona fide claim for damages against the creditor for maliciously commencing bankruptcy proceedings against him. The basis of that claim existed from the date of commencement of the bankruptcy proceedings. If the debtor had commenced his action at any time after the commencement of the bankruptcy proceedings and before the bankruptcy order has made against him, he might have been able to rely on his claim for damages to support an application to stay execution of the judgment or to stay further proceedings on the bankruptcy petition.

Thus it was possible that if the debtor had commenced his action for malicious prosecution against the creditor before he was adjusted a bankrupt, he might have obtained a stay for further proceedings and the costs order would never have been made. In other words, the stay order might have prevented the making of the costs order.

Cases referred to

1 *London Permanent Benefit Building Society* v *De Baer* [1968] 1 All ER 372 (foll)
2 *SAL Leasing (Pte) Ltd* v *Hendmaylex Pte Ltd* [1987] 2 MLJ 307 (folld)

Legislation referred to

Rules of the Supreme Court 1970 O 45 r 11

Scott Thillagaratnam for the appellant creditor.
KS Chung (*Ranmalice De Silva* (*Ms*) with him) for the respondent debtor.

Cur Adv Vult

Chan Sek Keong J: This is an appeal by the judgment creditor ('the creditor') against the decision of the senior assistant registrar dismissing its application for a stay of execution and all further proceedings on an order of costs made on 27 October 1988 ('the costs order') in these bankruptcy proceedings against the creditor. The costs order was made when the creditor consented to the annulment and rescission of adjudication and receiving orders made against the debtor on 4 September 1987 in these bankruptcy proceedings. The background events are as follows:

(1) the creditor obtained judgment ('the judgment') in the sum of $858,289.85 and interest in Originating Summons No 1515 of 1985 on 17 February 1986; the amount owing was secured by a mortgage of the debtor's house; the house was sold by the creditor as mortgagee on 1 August 1988 at the price of $1m; after off-setting the proceeds of sale, the balance remaining due under the judgment was about $120,000;

(2) prior to the sale of the property, the creditor had commenced bankruptcy proceedings against the debtor: both the bankruptcy petition (issued on 11 August 1986) and the bankruptcy notice (issued on 2 March 1987) were served by substituted service; the debtor was made a bankrupt on 4 September 1987; the debtor applied on 9 September 1987 to set aside the bankruptcy orders on the grounds (i) that he had not been properly served with the bankruptcy notice and the petition and (ii) that the bankruptcy notice failed to comply with s 5(1)(b) of the Bankruptcy Act (Cap 20, 1985 Ed): the adjudication and receiving orders were, by consent, set aside with costs on 27 October 1988; the costs were taxed on 3 August 1989 and 8 August 1989 at about $9,000;

(3) on 2 June 1989, the debtor commenced an action in Suit No 1056 of 1989 against the creditor claiming damages for malicious prosecution in relation to the bankruptcy proceedings; he then applied for and on 4 August 1989 obtained an order ('the stay order') to stay execution and further proceedings on the judgment on the ground that he had a claim in the said action;

(4) on 5 August 1989, the creditor made the application under appeal in respect of the costs order on the ground that in view of the stay order it would not be equitable if the debtor were allowed to enforce the costs order against the creditor whilst the creditor was not allowed to enforce the judgment against the debtor.

The creditor's application was made under O 45 r 11 of the Rules of the Supreme Court 1970 read with O 88A of the Bankruptcy Act (Cap 20, 1985 Ed). The said rule reads as follows:

> Without prejudice to Order 47 Rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks fit.

The issue before me is whether the creditor's application comes within the terms of O 45 r 1. Counsel for the debtor says that the court's power to make an order under that rule is restricted to any matter occurring since the date of the relevant judgment or order against which relief is asked, which, if it had occurred on or before the date of the judgment or order, would or might have led to the grant of such relief. He founded his submission on the decision of *London Permanent Benefit Building Society* v *De Baer*[1] where Plowman J defined the ambit of the corresponding English O 45 r 11 as follows:

> In my judgment, however, it is unnecessary for me to decide the question of inherent jurisdiction in the present case, because I have reached the conclusion that RSC O 45 r 11, under which the present application is made, does not, on its true construction, confer any power to grant a stay of execution on an order for possession made in favour of a legal mortgagee or a chargee by way of legal mortgage.
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> The power conferred by that rule to grant relief is a power to do so, and I quote, 'on the ground of matters which have occurred since the date of the judgment or order'. It is, in my judgment, implicit in the rule that the matters referred to are matters which would or might have prevented the order being made or would or might have led to a stay of execution if they had already occurred at the date of the order. (My emphasis.)

Counsel for the debtor submitted the word 'if' implies the possibility of the existence of the matter (which has occurred after the judgment or order) occurring before the date of the judgment or order. He also referred to the decision of Thean J in *Sal Leasing (Pte) Ltd* v *Hendmaylex Pte Ltd*[2] where Plowman J's interpretation of the said rule was accepted and applied. In that case, the facts were as follows. The plaintiffs who were lessors of equipment had obtained a default judgment against the first defendant who was the lessee. Having repossessed and sold the equipment, the plaintiffs sued the guarantors for the balance due and applied for summary judgment. The defence of the guarantors was that on a proper computation of the claim in accordance with the terms of the lease, nothing was due. Concurrently, the first defendant made an application for an order that the judgment against him had been satisfied. This application was dismissed by the registrar who also gave judgment against the guarantors. The lessee did not appeal, but the guarantors did and the judge allowed the appeal and gave them unconditional leave to appeal. The first defendant thereupon applied under O 45 r 11 for a stay of execution of the judgment against him pending the determination of the issue whether any part of the judgment remained unpaid. Thean J held that if judgment had not been entered against the first defendant when the appeals of the guarantors were allowed, judgment could not have been so entered, or if a judgment had been entered on that day, a stay of execution would or might have been granted. He accordingly granted a stay.

I agree with counsel for the debtor on his submission on the ambit of O 45 r 1. Accordingly, the only question I need to consider in this appeal is whether it was *possible* for the stay order to have occurred before the costs order so as to prevent the costs order being made, or if made, to lead to a stay of execution of the costs order. If it were possible for the stay order to have occurred at either of these points of time, the requirement of O 45 r 1 as explained by Plowman J would have been satisfied.

The stay order was applied for and obtained after the commencement of Suit No 1056 of 1989 which was commenced after the annulment of the bankruptcy orders. The stay order was granted by me not because of the fact of the annulment of the bankruptcy orders or the fact of the commencement of Suit No 1056 of 1989 but because the debtor had in that action made a bona fide claim against the creditor for damages for maliciously commencing bankruptcy proceedings against him. The basis of the claim, assuming it is a valid claim, existed from the date of commencement of the bankruptcy proceedings. The debtor cannot succeed in Suit No 1056 of 1989 unless he can prove the creditor's malice and the absence of a debt due by the debtor to the creditor at the commencement of the bankruptcy proceedings. In principle, there was nothing to prevent the debtor from commencing such an action at any time after the commencement of the bankruptcy proceedings (and of which he had knowledge) and before the bankruptcy orders were made against him in bankruptcy proceedings of which he had knowledge. If he had done so, he might have been able to rely on his claim for damages to support an application to stay execution on the judgment or to stay further proceedings on the bankruptcy petition. He might even have been able to apply to stay execution on the judgment, with the leave of the court to apply to set aside the bankruptcy notice and/or the bankruptcy petition in order to remove the condition of his having technically committed an act of bankruptcy. In principle, I cannot see why the court could not have given

an order of stay of execution on this rather exceptional basis, but, it is not necessary to form a concluded view on this point, as it is within the realm of possibility that if the debtor had commenced Suit No 1056 of 1989 before he was adjudged a bankrupt, he might have obtained a stay of further proceedings in the bankruptcy petition. In that event, the costs order would never have been made. In other words, the stay order would have prevented the making of the costs order. I should add that the stay order is not merely an order to stay the execution on the judgment but also all further proceedings on it.

For the above reasons, the test laid down by Plowman J and followed by Thean J had been satisfied. The appeal is allowed with costs here and below. There will be a stay of execution and all further proceedings on the costs order until the disposal of Suit No 1056 of 1989 or further order.

Appeal allowed.

Solicitors: *Khattar Wong & Partners*; *Chung & Co.*

Reported by *Teoh Ai Lin*

Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (t/a JB International)

HIGH COURT (SINGAPORE) — SUIT NO 2297 OF 1981
CHAO HICK TIN JC
1 DECEMBER 1981

Civil Procedure — Striking off plaintiffs' action — Plaintiffs' non-compliance with order for discovery — Whether plaintiffs had complied with order to file further and better list of particulars

The plaintiffs' claim was for the balance of moneys due from the defendant for goods sold and delivered to the defendant and commissions for the parties' partnership trading business in rubber. There was considerable dispute between the parties as regards the partnership accounts as well as the accounts relating to the goods allegedly sold to the defendant. Following a summons for directions made under O 25 of the RSC, the court ordered on 20 January 1984 that each party serve on the other a list of documents and file an affidavit verifying the same.

The plaintiffs filed their list of documents and affidavit verifying the same. The defendant by way of summons-in-chambers applied for an order for a further and better list of documents to be supplied by the plaintiffs. The court then ordered that the plaintiffs file a further and better list of documents and in default of compliance by the plaintiffs, the plaintiffs' action be struck off.

From the exchange of letters between the parties prior to the present application the plaintiffs had never claimed that the documents which had not been disclosed were not relevant. The plaintiffs' answer for non-production was either that the documents were not in the possession of the plaintiffs or that they were in the possession of the defendant.

The present application was made by the defendant by way of summons-in-chambers to have the plaintiffs' action struck off for failure or refusal by the plaintiffs to give proper discovery of documents in the possession, custody or power of the plaintiffs relating to the action.

Held, allowing the defendant's application:

(1) In general where there is an order of court for discovery, a party is obliged to make discovery of all documents relevant to the matters in the action. What these matters are would depend on the pleadings. A document is relevant if it contains information which may (not which must) either directly or indirectly enable the party requiring the discovery either to advance its own case or to damage the case of his adversary or which may fairly lead to a train of inquiry which may have either of those two consequences.

(2) Having regard to the pleadings and the affidavits filed, there is a dispute as to the terms of the partnership arrangements and as to which transactions are partnership transactions and which are not. In these circumstances, the documents, allegedly relating to the plaintiffs' own business, are in issue and should be disclosed.

(3) The plaintiffs' response that the documents were not in their possession or that they were in the possession of the defendant could not be accepted by the court, having regard to the nature of the documents and the nature of the transactions. The court also had difficulty in accepting the plaintiffs' statement that some of the records had been made on scraps of paper and thrown away, as all things indicated to the court that the plaintiffs had a proper system of recording.